No. 83-2076

In the Supreme Court of the United States

October Term, 1983

ROGER POLLARD,
Petitioner,

VS.

BOARD OF POLICE COMMISSIONERS AND
NORMAN A. CARON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE SUPREME COURT OF MISSOURI CORRECTLY RULE THAT THE APPLICATION OF MO. REV. STAT. § 84.830 TO PROHIBIT A PUBLIC PARTISAN POLITICAL CONTRIBUTION BY A POLICE SERGEANT DOES NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. DID THE SUPREME COURT OF MISSOURI CORRECTLY RULE THAT THE DETERMINATION OF THE MISSOURI STATE LEGISLATURE TO LIMIT THE APPLICATION OF MO. REV. STAT. § 84.830 TO OFFICERS AND EMPLOYEES OF THE KANSAS CITY POLICE DEPARTMENT DOES NOT DEPRIVE PETITIONER OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

III. DID THE SUPREME COURT OF MISSOURI CORRECTLY RULE THAT MO. REV. STAT. § 84.830 WAS NOT PREEMPTED BY THE FEDERAL ELECTION CAMPAIGN ACT?

IV. IF THE FEDERAL ELECTION CAMPAIGN ACT COULD BE CONSTRUED TO PREEMPT MO. REV. STAT. § 84.830, DOES THE PREEMPTION PROVISION OF THE ACT VIOLATE THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

In addition to the opinions cited in the Petition for Writ of Certiorari, the United States Court of Appeals for the Eighth Circuit has delivered an opinion in the companion case of *Reeder v. Kansas City Board of Police Commissioners, et al.*, Case Nos. 83-1353, 83-1849. The opinion of the court of appeals was filed May 3, 1984 and is reported at 733 F.2d 543. A copy of the opinion is contained in the Appendix hereto.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in the Petition for Writ of Certiorari, this case involves the Tenth Amendment to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

In 1861, the Missouri State legislature abolished the local police forces of St. Louis and Kansas City and created in their place metropolitan police departments independent of the city governments. The metropolitan police forces were to be operated by boards of police commissioners appointed by the Governor. 1861 Mo. Laws Reg. Sess. 446-53; 1861 Mo. Laws Spec. Sess. 63-67. The St. Louis Police Department has been operated by such a board since that time. However, in 1932, the Supreme Court of Missouri held that the statute applicable to Kansas City constituted an unconstitutional delegation of legislative power to an administrative agency. *State ex rel. Field v. Smith,* 329 Mo. 1019, 49 S.W.2d 74 (1936) (en banc). The court's decision had the immediate effect of placing the Kansas City Police Department back under the control of the city government.

Under the home rule of the Kansas City Police Department created by *State ex rel. Field v. Smith, supra,* employment on the force, and advancement within the department, became matters of a political patronage sys-

tem operated by Thomas J. Pendergast, the local boss of the party in power at the time. Halvey Depo. at 5-6; Tr. at 44-45. The key to political control of the department was a system of contributions under which officers and employees were bonded to the local machine. Tr. at 65. Individuals were required to pledge their support of and contribute to the party in order to obtain employment on the force. Officers were required to make contributions at the time of each primary and each general election in order to retain their positions. Halvey Depo. at 7-8; Tr. at 45.

While the Kansas City Police Department was politically controlled, it gained a wide-spread reputation for selective law enforcement, dependent upon the whim of the politicians. As petitioner points out, during this period "corruption in the Police Department was rampant." Petition for Writ of Certiorari at 3. The department permitted and protected gambling, prostitution, narcotics rings, and other forms of organized crime. Tr. at 40-44, 65-66; Ex. 1, K.C. Star, December 8, 1940. The police participated in intimidation and physical abuse of voters, vote fraud and other methods to insure that the machine, of which the police department had become a part, remained in power. Ex. 1, Focus, October 1938; Citizens League Bulletin, June 3, 1939; K.C. Star, March 24, 1946.

After seven years of home rule in Kansas City, the Missouri State legislature enacted a statute designed to put an end to the corruption and voter disenfranchisement that resulted from local political control of the police department. The statute returned control of the department to a board appointed by the Governor and required the board and all members of the force to refrain from participation in any partisan political activity. Mo. Rev. Stat. § 7645 (1939). The provision of the statute at

issue herein was amended to its present form in 1943. 1943 Mo. Laws 727, § 7681, now codified as Mo. Rev. Stat. § 84.830.

The pertinent portion of § 84.830 provides:

> No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.

Mo. Rev. Stat. § 84.830.1. The statute also provides that any officer found to have violated its provisions "shall be discharged forthwith from said service." Mo. Rev. Stat. § 84.830.7.

Petitioner is a sergeant of the Kansas City Police Department. In July of 1982 he made a $1,000.00 partisan political contribution to the Carnes for Congress Committee, the campaign committee of John Carnes, a candidate for the United States Congress in Missouri's Fifth Congressional District. News of that contribution was published in the *Kansas City Star*. The article identified petitioner as a Kansas City police officer and stated the amount of his contribution. As a result, respondents learned of the contribution and initiated disciplinary proceedings against petitioner. Petitioner then brought this action in the Circuit Court of Jackson County, Missouri to enjoin those proceedings. On October 28, 1982, the Circuit Court enjoined respondents from enforcing § 84.830 against petitioner, holding that its ban on political contributions was preempted by the Federal Election Campaign Act and violated the First Amendment to the United States Constitution.

Mark Reeder is also a sergeant of the Kansas City Police Department. Sergeant Reeder also made a partisan political contribution to the Carnes for Congress Committee in July of 1982. Sergeant Reeder's contribution was in the amount of $500.00. News of that contribution was publicized in the same manner as that of petitioner's contribution, and similar disciplinary proceedings were instituted against Sergeant Reeder. On August 10, 1982, Sergeant Reeder filed suit in the United States District Court for the Western District of Missouri to enjoin the enforcement of § 84.830 against him. That suit raises the same First Amendment, equal protection and preemption issues raised by petitioner herein.

In October of 1982, the *Reeder* case was submitted for decision on the basis of the record developed in the Jackson County Circuit Court in the *Pollard* case. On February 25, 1983, the district court adopted the holdings of the Jackson County Circuit Court and enjoined respondents from enforcing § 84.830 against Sergeant Reeder.

On March 15, 1984, the Supreme Court of Missouri reversed the decision of the Jackson County Circuit Court. The court held that the legislative history of the Federal Election Campaign Act shows clearly that Congress did not intend to preempt State laws regulating the political activity of public employees, that the prohibition of a partisan public political contribution by a police sergeant is a permissible restriction on the police sergeant's First Amendment freedom of association interests, and that the decision of the Missouri State legislature to apply that specific prohibition only to officers and employees of the Kansas City Police Department does not deprive petitioner of equal protection under the Fourteenth Amendment to the United States Constitution.

On May 3, 1984, the United States Court of Appeals for the Eighth Circuit filed an opinion holding that Mo. Rev. Stat. § 84.830 is not preempted by the Federal Election Campaign Act and does not violate the First Amendment to the United States Constitution. *Reeder v. Kansas City Board of Police Commissioners,* Nos. 83-1353, 83-1849, slip op. (8th Cir. May 3, 1984). However, the Eighth Circuit determined that the record generated in the *Pollard* case and stipulated to in the *Reeder* case was insufficient for a determination of the equal protection issue raised by Sergeant Reeder. Therefore, the court of appeals remanded the case to the district court for further proceedings. The case is pending on remand in the United States District Court for the Western District of Missouri.

SUMMARY OF ARGUMENT

Petitioner has cited no "special and important reasons" within the purview of Rule 17 of the Rules of this Court for granting review of this case by Writ of Certiorari. The issues raised by petitioner's First Amendment and equal protection arguments have previously been decided by this Court. The decision of the Supreme Court of Missouri is in accord with those prior decisions. Petitioner's preemption argument raises questions of statutory construction that are fully answered by the legislative history of the Federal Election Campaign Act. Therefore, there is no reason of the character outlined in Rule 17 for the Court to exercise its discretion to grant certiorari herein.

REASONS FOR DENYING THE WRIT

I. That a State May Constitutionally Prohibit a Police Sergeant From Making a Public Partisan Political Contribution Is Settled by Prior Decisions of This Court.

The Hatch Act provides that Federal government employees "may not . . . take an active part in political management or in political campaigns." 5 U.S.C. § 7324(a)(2). In *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1946), this Court held that provision to be a permissible restriction of government employees' freedom of expression under the First Amendment. In *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court "unhesitatingly reaffirm[ed] the *Mitchell* holding", stating that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees." *Id.* at 556. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court upheld a statute providing that no employee in the classified service of the State of Oklahoma "shall . . . take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

Mitchell, *Letter Carriers*, and *Broadrick* establish that a prohibition against direct participation in partisan political activity by government employees constitutes a permissible restriction on the employees' freedom of expression interests under the First Amendment. This result is achieved by balancing "the interests of the employee, as a citizen, in commenting upon matters of public

concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees." *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, supra* at 564. Where, as here, the only employee interest at issue is the freedom of association interest in indirect political participation through contributions of money, that balance weighs more heavily in favor of the government. *Buckley v. Valeo,* 424 U.S. 1 (1976).

In *Buckley,* the Court considered the constitutionality of provisions of the Federal Election Campaign Act that placed limitations upon political contributions by individuals and committees, and upon direct expenditures for or by candidates. The Court held that "the primary First Amendment problem raised by the Act's contribution limitations is the restriction of *one aspect of the contributor's freedom of political association.*" *Id.* at 24 (emphasis supplied). On the other hand, the Court held that the direct expenditure limitations "placed substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression." *Id.* at 58-59. Therefore, the Court upheld each of the contribution limitations and struck down each of the expenditure limitations, stating that the Act's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." *Id.* at 23.

The restrictions on direct partisan political activity upheld by the Supreme Court in *Mitchell, Letter Carriers,* and *Broadrick* impinged upon "core" First Amendment rights of political expression. *See Buckley v. Valeo, supra* at 44-45. The evidence below establishes that Mo. Rev. Stat. § 84.830 serves the same governmental interests held to justify those restrictions. Petitioner's challenge to the

application of that regulation to the less protected political association interest in making a public partisan political contribution creates no issue not previously resolved by decisions of this Court. The holdings of the Supreme Court of Missouri herein, and of the Eighth Circuit in *Reeder* are in accord with those prior decisions.

II. That the Determination of the Missouri State Legislature to Apply Mo. Rev. Stat. § 84.830 Only to Kansas City Police Officers and Employees Does Not Constitute a Denial of Equal Protection Is Settled by Prior Decision of This Court.

The Oklahoma statute at issue in *Broadrick v. Oklahoma, supra* prohibited political activity by employees in the classified service of the State, but did not apply to unclassified personnel. The plaintiffs, who were classified service employees, argued that this constituted a denial of equal protection under the Fourteenth Amendment. The Court rejected that contention, stating:

> The contention is somewhat odd in the context of appellants' principal claim, which is that [the statute] reaches too far rather than not far enough. *In any event, the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. See McGowan v. Maryland,* 366 U.S. 420 (1961). *And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.*

Broadrick v. Oklahoma, supra at 607 n.5 (emphasis supplied). Petitioner's equal protection argument presents the same issues disposed of by the Court in *Broadrick*. Therefore, that argument presents no "special and important reasons" for granting certiorari.

III. That the Federal Election Campaign Act Does Not Preempt State Laws Regulating the Political Activity of State and Local Officers and Employees Is Settled by the Legislative History of the Act.

The Federal Election Campaign Act was passed in 1971 "to promote fair practices in the conduct of election campaigns for Federal political offices." S. Conf. Rep. No. 580, 92nd Cong., 2d Sess. 1, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 1866. In 1974, the Act was amended. The preemption provision on which petitioner relies was included in the 1974 Amendments to the Act.

The Conference Report on the 1974 Amendments to the Act states:

> It is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is not preempted or superseded by the amendments to title 5, United States Code, made by this legislation.

S. Conf. Rep. No. 1237, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News at 5669. The House Report states that, under the 1974 Amendments to the Act, "[t]he regulation of political activities of State and local employees would be left largely to the States." H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 11, *reprinted in* FEC, *The Legislative History of the 1974 Amendments to the Federal Election Campaign Act* at 645. These statements were expounded upon during the Senate floor debates on the Conference Report on the 1974 Amendments.

Senator Cannon of Nevada was the chairman of the Committee on Rules and Administration, to which the Senate bill was reported, and also the chairman of the Senate conferees. Senator Stevens of Alaska was one

of the Senate conferees. During the floor debates on the Conference Report they had the following discussion:

MR. STEVENS. Mr. President, just 1 minute. I should like to clarify something, if I may, with the manager of the bill.

A provision of this bill amends section 1502 of title 5 relating to the activity of State or local employees in Federal campaigns. Specifically, it takes out subsection (a)(3), which prohibits a State or local officer or employee from taking an active part in political management or political campaigns, and substitutes for that a prohibition from being a candidate for Federal office.

It is my understanding, and *I should like to ask the manager of the bill,* my friend from Nevada (Mr. Cannon), *if he agrees that this means that State laws which prohibit a State employee, or local laws which prohibit a local employee, from engaging in Federal campaign activities and Federal campaigns are still valid?*

What we are doing is taking out of the Federal law the prohibition against State or local employees from taking an active part in political management or political campaign? Is that correct?

I think it is quite important, because many of our States have the so-called little Hatch Act, and *it was not our intent to repeal those "little Hatch Acts," or to modify them, but to take it out of the Federal law so that Federal law does not prohibit those activities, leaving it up to the State to do so.*

MR. CANNON. *The Senator is absolutely correct.* Section 401 of the House amendment amended

section 1502 of title 5, U.S. Code, relating to influencing elections, taking part in political campaigns, prohibitions, and exceptions, to provide that State and local officers and employees may take an active part in political management and in political campaigns, except that they may not be candidates for elective office.

The conference substitute is the same as the House amendment. *It was the intent of the conferees that any State law regulating the political activity of State or local officers or employees is not preempted, but [sic][1] superseded.* We did want to make it clear that if a State has not prohibited those kinds of activities, it would be permissible in Federal elections.

This would get away from the situation in which the Federal Government gives the State funds toward many different programs, and some of those employees have been fearful that they could not participate in Federal campaigns. This would eliminate that problem.

MR. STEVENS. *It is up to the State to determine the extent to which they (public employees) may participate in Federal elections?*

MR. CANNON. *The Senator is right. The States make that determination.*

120 Cong. Rec. S 18538 (daily ed. October 8, 1974), *reprinted in* FEC, *The Legislative History of the 1974 Amendments to the Federal Election Campaign Act* at 1092 (emphasis supplied).

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1. It is clear from the context of Senator Cannon's remarks, his declaration that the States make the determination whether public employees may participate in Federal election, and the Conference Report, that this statement should read "not preempted or superseded".

As the Eighth Circuit noted in *Reeder*, this legislative history "leaves little room for doubt" that the Federal Election Campaign Act did not and was not intended to preempt State laws such as Mo. Rev. Stat. § 84.830. Therefore, petitioner's preemption argument presents no "special and important reasons" for granting certiorari.

CONCLUSION

The issues presented by petitioner's First Amendment and Equal Protection arguments have previously been decided by this Court. The issue presented by petitioner's preemption argument is resolved by the legislative history of the Federal Election Campaign Act. Thus, there are no "special and important reasons" for the Court to exercise its discretion to review the decision of the Supreme Court of Missouri on writ of certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-1353, 83-1849

Mark Reeder,
Appellee,

v.

Kansas City Board of Police Commissioners, Norman A. Caron, Edward S. Biggar, Gwendolyn M. Wells, Beverly Parks Barker, Richard L. Berkley, and William Birt,
Appellants.

On Appeal from the United States District Court
for the Western District of Missouri.

Submitted: January 9, 1984
Filed: May 3, 1984

Before ROSS and ARNOLD, Circuit Judges, and HARRIS,* Senior District Judge.

ARNOLD, Circuit Judge.

The law of Missouri, Mo. Rev. Stat. §84.830(1), forbids officers or employees of the Kansas City Police

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*The Hon. Oren Harris, Senior United States District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

Department to make any political contribution.[1] Mark Reeder, a Kansas City Police Sergeant, gave $500.00 to the campaign of John Carnes, a candidate for the Democratic nomination for Representative in Congress from Missouri's Fifth District. As a result, he was dismissed from the police force. In a suit filed by Reeder, the District Court held the state statute invalid on two grounds: that it was preempted by Section 301 of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1289, 2 U.S.C. §453, and that it abridged Reeder's freedom of speech in violation of that portion of the Fourteenth Amendment that applies the First Amendment to the states. We reverse on both these points, but remand for further proceedings on Reeder's claim that the statute deprives him of the equal protection of the laws because it applies to Kansas City police officers but no others in Missouri.

I.

After the oral argument in this Court, the Supreme Court of Missouri decided *Pollard v. Board of Police Comm'rs*, No. 64637 (Mo. Feb. 15, 1984) (en banc). *Pollard* holds that Section 84.830 is neither preempted nor inconsistent with the First Amendment as construed

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1. Mo. Rev. Stat. §84.830, Police department—prohibited activities—penalties (Kansas City), provides in relevant part:

> No officer or employee in the service of said police department shall directly or indirectly give, pay, lend, or contribute any part of his salary or compensation or any money or other valuable thing to any person on account of, or to be applied to, the promotion of any political party, political club, or any political purpose whatever.

Section 84.830(1) applies to Missouri cities with 300,000 to 700,000 inhabitants, Mo. Rev. Stat. §84.350, but is specifically classified under the heading "PROVISIONS APPLICABLE TO KANSAS CITY." Only Kansas City falls in the specified population range.

by the Supreme Court of the United States. We are of course not bound by holdings of the Supreme Court of Missouri, just as it is not bound by our holdings. The filing of the *Pollard* opinion leaves our obligation to consider the issues on this appeal undiminished. We nevertheless find Judge Blackmar's opinion for the Supreme Court of Missouri thorough and persuasive. We agree with it both as to preemption and the First Amendment, and there is no point in repeating an analysis already so well set out. We add a brief discussion to address some points particularly urged in Reeder's brief.

A.

Title 2 U.S.C. §453 provides:

> The provisions of this Act [the Federal Election Campaign Act of 1971, as amended], and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

Certainly a law prohibiting certain people from contributing to campaigns for federal office can be considered a "law with respect to election to Federal office." But that is not the end of the matter. The statute can also be read to refer primarily to the behavior of candidates - including, for example, the filing of reports disclosing the names and occupations of campaign contributors - and to supersede state laws on permissible contributions only to the extent that federal law expressly forbids certain kinds of contributions - those, for example, made by unions, corporations, or foreign nationals. Even Reeder seems to concede that some state laws that could be characterized as coming within the preemption provision, if read literally and broadly, remain valid. See Brief

for Appellee 11 (States retain the right to prohibit false registration, voting fraud, and theft of ballots, even with respect to federal elections). The preemption statute, then, is not so clear (if any statute ever is) as to preclude us from consulting the legislative history.

The conference report on the bill that became the 1974 amendment leaves little room for doubt on this question. The report says:

> It is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is not preempted or superseded by the amendments to title 5, United States Code, made by this legislation.

S. Conf. Rep. No. 93-1237, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 5618, 5669. Furthermore, right before the conference report was agreed to by the Senate, a colloquy took place between Senator Stevens and Senator Cannon that covers this very point. Senator Cannon was Chairman of the Committee on Rules and Administration, from which the bill was reported, senior conferee on the part of the Senate, and manager of the bill on the Senate floor, so his remarks must be given special weight in determining what Congress meant to say. Mr. Cannon stated that "any State law regulating the political activity of State or local officers or employees is not preempted [or] . . . superseded." 120 Cong. Rec. 34386 (Oct. 8, 1974). "It [would be] . . . up to the State to determine the extent to which they may participate in Federal elections[.]" *Ibid.* (remarks of Senator Stevens).

Sergeant Reeder seeks to avoid the force of this passage by emphasizing the word "activity." It was only active campaigning, such as speechmaking or service

on a campaign committee, that was to be left to State regulation, he says. Contributions by state employees were to be governed entirely by federal law, and since no federal law prohibits such contributions, they cannot be forbidden by a State, either. The argument is that "activity" is a term of art, intended to include only those political activities that had previously been prohibited by federal law if engaged in by state employees whose jobs or programs received federal funds. Our attention is called to the Supreme Court's opinion in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), in which, in two footnotes, *id.* at 572-74 n.18, 576-78 n.21, certain activities forbidden by regulation are listed. It is said that this list of prohibited activities did not include contributions. Therefore, we are told, Senators Cannon and Stevens, when using the term "activity," could not have intended to include contributions.

We are not persuaded by this line of argument. In the first place, the single word "activity" is too weak a reed to bear the weight plaintiff asks us to load upon it. We readily acknowledge that the two Senators involved were well versed in their field. But to attribute to them detailed knowledge of two footnotes in a Supreme Court opinion decided the previous year, an opinion their colloquy does not even mention, and to infer from that an intention to distinguish between contributions and other types of political "activity," is fanciful. In addition, the two footnotes relied on are not so clear as plaintiff makes out. In general, the Civil Service Commission rules set out in note 18 did allow "[v]oluntary contributions to campaign committees and organizations." 413 U.S. at 574 n.18. But they also provided: "Contributions by persons receiving remuneration from funds ap-

propriated for relief purposes are not permitted." *Ibid.* And the rules quoted in note 21, while allowing political contributions in general terms, also authorized agency heads to prohibit any "activity permitted by paragraph (a) of this section,[2] if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests." 413 U.S. at 577 n.21.

The attempted distinction between "activities" and contributions is too artificial to carry the day here. When the Senators used the word "activity," there was, we think, no reason to suppose that they harbored an unspoken intention to exclude from that category political contributions by State employees. They intended instead to leave the States free, so far as any claim of preemption was concerned, to allow or forbid political activities, including contributions, by their own employees.

B.

In support of his argument that the statute violates the First Amendment, Reeder stresses that the campaign to which he contributed was a campaign for federal office, that the candidate he supported was actually a member of the City Council of Independence, Missouri, not of Kansas City, and that a member of Congress has no power to influence for good or ill the career of a city police officer. We are not persuaded that these considerations diminish the state's interest enough to require a decision in favor of the plaintiff. Politics, like law, is in many respects a seamless web. Candidates for public office often make, or appear to make, alliances

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2. Contributions were permitted by paragraph (a)(8) of the section referred to. The regulations quoted by the Supreme Court thus used the term "activity" to include contributions.

among themselves. "The legislature would have good reason to think that a prohibition which did not extend to federal candidates and federal elections would be futile. The major parties operate on a national basis and function in federal, state and local contests. . . . A contribution to a congressional candidate well might benefit the local politicians who have made common cause with that candidate." *Pollard v. Board of Police Comm'rs, supra,* slip op. 13. Certainly the dangers posed by a direct contribution to a candidate for Mayor or Governor are more obvious, since the Mayor is a member of the Kansas City Board of Police Commissioners, and the Governor appoints the remaining members. But the difference between this kind of contribution and a contribution like the one Reeder made here is not sufficiently pronounced to require a holding that the latter may not be validly prohibited, even if the former may.

The fact is that public employees are subject to more severe restrictions than the public at large. No one would contend, for example, that Congress or a state legislature could forbid a member of the public from becoming a candidate for the state Senate. Yet, precisely that prohibition has been upheld by this Court as applied to an officer of the St. Louis Police Department. *Otten v. Schicker,* 655 F.2d 142 (8th Cir. 1981). People who become public employees receive certain benefits and undertake certain duties. One of those duties may require the surrender of rights that would otherwise be beyond the reach of governmental power. This is especially true in the case of the police, whose duty it is to keep the peace by force of arms if necessary. "A state may demand of its police officers a more exacting standard of conduct than it could validly impose by criminal statute on citizens in general." *Vorbeck v. Schicker,* 660 F.2d 1260, 1267 (8th Cir. 1981) (Arnold, J., con-

curring), *cert. denied,* 455 U.S. 921 (1982). It is proper for a state to insist that the police be, and appear to be, above reproach, like Caesar's wife.

It is undeniable that this kind of restriction does abridge the freedom of speech in a literal sense. But the Supreme Court has often stated that First Amendment rights, despite their preferred position in our constitutional scheme, are not absolute. They must yield on occasion to the demands of public safety. The Supreme Court has clearly stated that government may impose on its own employees rather substantial restrictions on political activity that is open without question to the citizenry at large. See *Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548 (1973); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). The same power that may prevent a public employee from making a political speech or conducting a political meeting (even on the employee's own time) may also forbid campaign contributions. Plaintiff cites *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam), and *Elrod v. Burns,* 427 U.S. 347 (1976), in an effort to persuade us that the holdings in *Mitchell, Letter Carriers,* and *Broadrick* are out of date, but we are not convinced. *Buckley* does say that contributing to campaigns is an activity protected by the First Amendment, but *Buckley* involved a statute applicable to the public at large, not just to public employees. *Elrod* was a public-employee case, but it stands only for the proposition that a public official may not summarily dismiss his subordinates because of their ideology or political association. The interest there weighed against First Amendment rights was not really an interest of the state as a whole at all, but rather an individual interest of the newly elected official who wished to purge the ranks of his employees.

The Supreme Court has never spoken directly on the subject of political contributions by police officers or other public employees, but we find in *Kelley v. Johnson*, 425 U.S. 238 (1976), an implication that restraints on campaign contributions would not be treated differently from other kinds of prohibitions against political activity that have been upheld. In *Kelley* the Court upheld a regulation of the Police Department of Suffolk County, New York, imposing certain limits on the length of police officers' hair. In the course of its opinion, after remarking that "we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment," *id.* at 245, the Court set forth the following description of various restrictions imposed on police officers of Suffolk County by their employer:

> The hair-length regulation here touches respondent as an employee of the county and, more particularly, as a policeman. Respondent's employer has, in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large. Respondent must wear a standard uniform, specific in each detail. When in uniform, he must salute the flag. He may not take an active role in local political affairs by way of being a party delegate or *contributing* or soliciting political contributions. He may not smoke in public. All of these and other regulations of the Suffolk County Police Department infringe on respondent's freedom of choice in personal matters. . . .

Id. at 245-46 (emphasis ours). We do not pretend to find in this passage a holding that a prohibition against contributions is valid. That question was not presented

in *Kelley*. There is, however, a fairly clear implication in the opinion that the six Members of the Court who joined it believed that a restriction on contributions would be upheld. There is no other good explanation for the Court's decision to list contributions in its opinion among those activities that the employees of the police department before it were not allowed to engage in.

In short, though the State of Missouri could certainly have made a different choice, the Supreme Court's cases compel the conclusion that the choice made here does not exceed the state's constitutional power under the First Amendment.

II.

Plaintiff also argues that §84.830(1) violates the Equal Protection Clause of the Fourteenth Amendment. The statute applies to police officers in Kansas City only. No state statute forbids political contributions by other police officers, either state or local. In fact, Rule 7.012 (a)(1)(h) of the St. Louis Police Department specifically permits police officers in that city to "make a financial contribution to a political party or organization." The District Court did not reach this question, having already held the statute invalid on other grounds.

We have power to affirm the judgment below on any ground supported by the record, whether or not raised or relied on in the District Court. See, *e.g.*, *Brown v. St Louis Police Department*, 692 F.2d 61 (8th Cir. 1982). This power should normally be exercised only where the issue is one of law, no factual questions are outstanding that might affect its resolution, and there is no reason to believe that we would benefit from giving the opportunity to the District Court to address

the question in the first instance. We believe this case is an appropriate one for a remand on the equal-protection issue. The District Court never addressed it, and the record before us is not really adequate to enable us to address it. The information cited above about the regulations of the St. Louis Police Department was supplied to us by stipulation after oral argument. We have no definite information about the rules or regulations of other police departments in Missouri. In addition, we think the defendants ought to be allowed a chance to offer evidence to justify the seeming disparity between Kansas City and other police departments in the state.

The Supreme Court of Missouri, *Pollard v. Board of Police Comm'rs, supra,* slip op. 17, rejected the equal-protection argument rather summarily, citing only our opinion in *Otten v. Schicker, supra.* But *Otten* involved an alleged discrimination between police officers on the one hand and other public employees on the other. That kind of distinction is easier to draw and to justify than a distinction between police officers in one city and police officers in another. In addition, this kind of classification, affecting as it does First Amendment rights, may require more than simply a rational basis to withstand constitutional attack. In short, the issue should be developed further on remand.

The judgment is reversed, and the cause remanded for further proceedings on the equal-protection claim in accordance with this opinion.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.